Supreme Court, U.S.
FILED

No. ____

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IN THE

SUPREME COURT OF THE UNITED STATES

CLERK

October Term, 1994

RICHARD FLECK and DIANE FLECK,
Petitioners

v.

HOFFINGER INDUSTRIES, INC.;
DOUGHBOY RECREATIONAL, INC.,
Defendants and Third-Party Plaintiffs

v.

KDI SYLVAN POOLS, INC., a/k/a SYLVAN POOLS;
JAMES HUBERT; POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR CORP. OF AMERICA, formerly
GIBRALTAR FACTORS CORP.; S & V POOLS, INC.,
Third-Party Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a suit against the manufacturer of a liner for a swimming pool in which plaintiff Richard Fleck dove and suffered quadriplegic injuries, did not the court below err when it entered summary judgment for defendants against plaintiffs on the ground that plaintiffs should be "penalized" for not suing defendants in a prior lawsuit that plaintiffs brought against others arising out of the accident, where:

(a) Federal Rule of Civil Procedure 20 provides for a "permissive" joinder of parties defendant, not a mandatory joinder; and

(b) the ruling of the court below conflicts with the Supreme Court's recent opinion in *Temple v. Synthes Corporation Ltd.*, 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed. 2d 263 (1990).

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OPINIONS BELOW

The opinion and order of the District Court are included herein at Appendix A1-A8. The judgment order of the U.S. Court of Appeals for the Third Circuit is included herein at Appendix A9-A10.

These opinions do not appear in the West Reporters.

GROUNDS FOR JURISDICTION

The Amended Judgment Order of the U.S. Court of Appeals for the Third Circuit was entered on June 22, 1994.

Jurisdiction of the Supreme Court to review this judgment order by writ of certiorari is conferred by 28 U.S.C. §1254.

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 19, provides, in pertinent part:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the persons's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Federal Rule of Civil Procedure 20 provides, in pertinent part:

> **Rule 20. Permissive Joinder of Parties**
>
> (a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) *may* be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities. [Emphasis supplied.]

STATEMENT OF CASE

On August 8, 1987, in the early evening, Richard Fleck, then 23 years old, dove into an above-ground swimming pool located on the premises of third party defendant James Hubert in West Chester, Pennsylvania, broke his neck, and became a quadriplegic. Defendants (hereinafter referred to as "Hoffinger") manufactured the liner that covered the bottom and sides of the pool at the time of the accident. There were no depth markers or warnings on the liner.

No trial was held in the instant case because the trial judge granted summary judgment to defendant

Hoffinger on the ground that plaintiffs should be "penalized" for not having sued Hoffinger directly in a prior lawsuit that they filed against other parties arising out of the accident. The trial judge said that the appropriate penalty was to grant summary judgment for Hoffinger against the plaintiffs, and he did so. Appendix, A1-A9.

In the prior lawsuit, a jury awarded Richard Fleck $10,000,000 for his injuries, and Diane Fleck $250,000 for her loss of consortium, but they were able to collect less than twenty percent of their verdicts because the culpable defendant in that case (Nichols Swim Pools, Inc.) went bankrupt prior to trial (for unrelated reasons), and plaintiffs had to limit their claims against it to the amount of its liability insurance coverage in order to have the automatic stay of the Bankruptcy Code lifted (11 U.S.C. §362). See *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107 (3d Cir. 1992).

Jurisdiction in the district court was based upon diversity of citizenship and amount in controversy, pursuant to 28 U.S.C. §1332.

Jurisdiction in the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. §1291.

ARGUMENT

THE COURTS BELOW ERRED IN HOLDING THAT PLAINTIFFS SHOULD BE PENALIZED FOR NOT SUING DEFENDANT HOFFINGER DIRECTLY IN A PRIOR LAWSUIT, AND THAT THE PENALTY SHOULD BE DISMISSAL OF THEIR CASE.

In a diversity case the question of joinder is one of federal law. *Provident Bank & Trust Co. v. Patterson* (1968) 390 U.S. 102, 125 (f.n. 22), 88 S.Ct. 733, 19 L.Ed.2d 936.

Federal Rule of Civil Procedure 19(a) describes "persons to be joined if feasible." Hoffinger does not fit the criteria set forth in the rule. See *Temple v. Synthes Corporation Ltd.* (1990) 498 U.S. 5, 111 S.Ct. 315, 112

L.Ed.2d 263. Even if it did, the remedy should have been insistence in the prior case that Hoffinger be joined as a direct defendant or dismissal of that case. See *Provident Bank & Trust Co. v. Patterson*, supra.

Plaintiffs did not sue Hoffinger directly in the prior case because (1) when they instituted that lawsuit they did not know that Hoffinger manufactured the liner; (2) after they instituted that lawsuit, co-defendant Nichols, the retailer of the liner, joined S.K. Plastics, Inc. as a third party defendant, alleging that it was the manufacturer of the liner, and (3) though counsel for Nichols informed counsel for plaintiffs shortly before the running of the statute of limitations on August 8, 1989, that Hoffinger might be the manufacturer, it did not then dismiss S.K. Plastics, Inc. as a third party defendant. It did not do so and did not obtain permission to join Hoffinger as a third party defendant until August 21, 1989, after the statute of limitations had already run on the plaintiffs.

(However, Hoffinger, once it had been joined as a third party defendant, could have removed to federal court the savings action that plaintiffs had instituted against it by summons in Pennsylvania state court. Robert Korn, Esq., who represented Hoffinger in the prior case in federal court, also entered his appearance for Hoffinger in the state court action. Hoffinger could also have agreed to waive the statute of limitations so that plaintiffs could move to join it directly in the federal court action. It did neither.)

Though Hoffinger was sued in the prior case as a third party defendant, not a direct defendant, it nevertheless had opportunity to contest and litigate all of the claims made by plaintiffs that could have an adverse effect upon it. Hoffinger did so, and plaintiffs won. Appendix, A-5.

Joinder of defendants who are jointly and severally liable to the plaintiff in a tort action is permissive, not mandatory, in the federal courts. Federal Rule of Civil Procedure 20.

In *Temple v. Synthes Corporation Ltd.* (1990) 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed.2d 263, a patient who was injured when surgical screws broke in his back sued the manufacturer in a federal district court. He sued the doctor and the hospital involved in a Louisiana state court. The federal court ordered him to join the doctor and the hospital in the federal lawsuit, and, when he failed to do so, dismissed his case. The Fifth Circuit affirmed, opining that joinder of defendants was required in the interests of judicial economy. The Supreme Court reversed, per curiam, explaining that in the federal courts defendants who are jointly and severally liable to the plaintiff in a tort action are subject to permissive joinder, not mandatory joinder.

Under Pennsylvania substantive law, which applies in the instant case, two tortfeasors who are strictly liable to a plaintiff for sale of a defective product are joint tortfeasors who are severally and jointly liable to the plaintiff. *Walton v. Avco Corp.* (1992) 530 Pa. 568, 610 A.2d 454.

What the court below did, in effect, is adopt for the Third Circuit New Jersey's eccentric "entire controversy doctrine." In *Crispin v. Volkswagonwerk, A.G.* (1984) 96 N.J. 336, 476 A.2d 250, 253-254, the New Jersey Supreme Court promulgated a new judicial doctrine that would bar a plaintiff from asserting a claim against one whom plaintiff had not joined as a party defendant in a prior related proceeding. It did this *prospectively* to avoid penalizing the plaintiff, who had relied on longstanding prior law. In the instant case the court below adopted this judicial doctrine *retroactively*, thus enabling it to "penalize" the Flecks, who also had relied on longstanding prior law.

This was wrong because New Jersey's "entire controversy doctrine" is not the law in the federal courts, and conflicts with the law enunciated by the United States Supreme Court in *Temple v. Synthes Corp., Ltd.* (1990) 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed.2d 263. (It is not the law of Pennsylvania, either. It is apparently a

peculiar minority view espoused by the New Jersey Supreme Court. See Comment, *The Entire Controversy Doctrine: A Novel Approach to Judicial Efficiency*, 12 Seton Hall Law Review 260, 287.)

The rulings of the courts below not only violate the law promulgated by the United States Supreme Court in the *Temple* case, supra, but also violate fundamental principles of justice and fair play. The courts below, in effect, changed the rules of the game in order to deprive a young, permanently quadriplegic plaintiff of his day in court against the manufacturer of a product that a jury in a previous case had found, after a full and fair trial, to be defective and responsible for his injuries.

Richard Fleck has received less than twenty percent of what the jury found to be reasonable compensation for his injuries because the defendant found liable in the first trial declared bankruptcy (for reasons unrelated to his lawsuit) and had limited liability insurance coverage. He is now being deprived of any opportunity to obtain part of the remaining eighty percent of the damages to which a jury found that he was entitled, because the courts below changed the rules on him, without warning, and then "punished" him for not anticipating the change.

CONCLUSION

Plaintiffs request the Court to grant their petition for a writ of certiorari, and to overrule the decisions of the courts below because they conflict with Federal Rules of Civil Procedure 19 and 20 and applicable case law from the United States Supreme Court, i.e., *Temple v. Synthes Corp., Ltd.* (1990) 498 U.S. 5, 111 S.Ct. 315, 112 L.Ed.2d 263.

Respectfully submitted,

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